

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 940 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

BIJAL KANTILAL

Versus

COMMISSIONER OF INCOME TAX GUJARAT III

Appearance:

MR SN SOPARKAR for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 17/09/1999

ORAL JUDGEMENT (per:Patel.J)

#. The petitioner, being aggrieved by the order Annexure 'A' passed by the Commissioner of Income-tax, Gujarat-III, Ahmedabad on 18.2.1997 has preferred this application inter alia praying to quash and set aside the order with a direction to dispose of the revision

application in accordance with law.

#. The short facts as it emerges from the proceedings are as under:

That the applicant filed the return for the Assessment Year 1994-95 claiming carry forward of long term capital loss of Rs. 28,23,693/- and short term capital loss of Rs. 2908/- on 29.6.94. It appears that soon thereafter a revised return was filed on 21.9.1994, claiming slightly higher capital loss. After the process of the return, the applicant submitted an application on 23.8.1996 under section 154 of the Income-tax Act 1961 (hereinafter referred to as the said Act) stating that inadvertently the assessee has omitted to include in the two returns the long term capital loss of Rs.23,42,600/which was incurred on sale of 32500 shares of Rustom Mills & Industries by Bijal Trust. On the basis of the trust deed the loss incurred by the trust was claimed , which was assessable in the hands of the settlor under section 61 of the said Act. The assessing officer was requested to increase the capital loss by a further sum of Rs. 23,42,600/-. However, no action was taken on the assessee's application.

#. It appears that in view of this, an application was submitted under section 264 of the said Act seeking a direction that the capital loss in respect of the Assessment Year 1994-95 may be directed to be increased by the aforesaid loss of Rs.23,42,600/-

#. Section 264(1) of the said Act reads as under:

"264(1). In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit"

A reading of section 264(1) it is apparently clear that if an application is made by the assessee to the Authority, then the Authority exercising revisional power has to call for the record of the proceeding under the Act, in which such order has been passed and only thereafter, as contemplated under section 264(1) of the

Act, the order is required to be passed. In the instant case, the Commissioner of Income-tax exercising power under section 264 of the Act arrived at a conclusion that long term capital loss was not of a nature which could be allowed without scrutiny and without examination of the provisions of the Trust deed. When the powers are to be exercised, obviously, one has to call for the record and preceding and thereafter has to pass an order.

#. It is required to be noted that the loss was incurred by the Trust settled by the assessee. It was also claimed that the Trust was a revocable Trust and that the provisions of section 61 were applicable. It is further observed that the assessee's claim of long term capital loss was not of a nature which could have been allowed without scrutiny of the transactions or without ascertaining the cost of acquisition and sale price of shares and without scrutiny and examination of the deed of settlement of Bijal Trust. When there is any mistake apparent from the record, then with a view to rectify the same, power can be exercised under section 154 of the Act. So far as the revision is concerned, it is clear that under section 264 of the Act the Commissioner is empowered to exercise the revisional power. In exercise of this power, the Commissioner may, either of his own motion or on an application by the assessee call for the record of any proceeding under the Act and pass such order thereon.

#. Considering the provision contained in section 264 it is apparent that subject to the limitation mentioned therein, the powers conferred on the Commissioner under section 264 are very wide. He has the discretion to grant or refuse the relief and power to pass such order in revision as he may think fit. The discretion which the Commissioner has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. There is nothing in section 264 of the Act which places any restriction on the Commissioner's power to give relief to the assessee subject to the limitation mentioned in the section.

#. When the Commissioner has considered the revision application it was his duty to call for the record of the proceedings and thereafter to pass an order in accordance with law.

#. For the reasons stated hereinabove, we allow this petition. The order passed by the Commissioner of Income-tax Gujarat-III, Ahmedabad is hereby quashed and

set aside . The Commissioner of Income-tax, Gujarat-III, Ahmedabad is directed to hear and decide the revision application on merits in accordance with law. Rule is made absolute with no order as to costs.